In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1619

HOWARD WATERHOUSE AND NANCY HALL, PETITIONERS

v.

JOHN N. MITCHELL AND GEORGE C. BEALL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The present civil action was instituted by two citizens and taxpayers of the United States, seeking a writ of mandamus to compel the Attorney General of the United States and/or the United States Attorney for the District of Maryland to sign a proposed indictment returned by a federal grand jury in Maryland, and thereafter to prosecute that indictment. The United States Attorney, on the recommendation of the Department of Justice (Pet. App. 33–35), declined to sign the indictment or to prosecute the proposed charges.

The district court, in an extensive opinion, dismissed the mandamus petition largely on the author-

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ity of *United States* v. *Cox,* 342 F. 2d 167 (C.A. 5), certiorari denied, 381 U.S. 935, holding that the Executive Branch of the federal government has the legal power to refuse to institute or prosecute a criminal charge, and that the signature of the United States Attorney, or his authorized delegate, is a necessary condition to returning a valid indictment (Pet. App. 2–23).[1] The court of appeals affirmed *per curiam* (Pet. App. 1–2), relying on the opinion of the district court.

Even assuming that petitioners have standing to bring the present action, their mandamus petition was properly dismissed for the reasons stated by the district court. As the Fifth Circuit declared in *United States* v. *Cox,* 342 F. 2d 167, 171:

> * * * The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exer-

[1] Other portions of the district court's opinion, not at issue here, deal with the right of the grand jury to return a presentment and to have the substance of that presentment made public by the court (Pet. App. 23–31).

> cise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. * * *

And see, in addition to the authorities cited below, *Newman* v. *United States,* 382 F. 2d 479, 480–481 (C.A.D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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